IN THE SUPREME COURT OF NEVADA

JASON T. SMITH, an individual, Appellant, vs. KATY ZILVERBERG, an individual; and VICTORIA EAGAN, an individual, Respondents.	Supreme Ct. No. 80154 Dist. Ct. Case No.: A-19-798171-C
JASON T. SMITH, an individual, Appellant, vs. KATY ZILVERBERG, an individual; and VICTORIA EAGAN, an individual, Respondents.	Supreme Ct. No. 80348 Dist. Ct. Case No.: A-19-798171-C

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On Appeal from the Eighth Judicial Court for the County of Clark in Nevada
Case No. A-19-798171-C
Hon. Jim Crockett

APPELLANT'S OPENING BRIEF

GUS W. FLANGAS, ESQ.
Nevada Bar No. 4989
E-mail: gwf@fdlawlv.com
KIMBERLY P. STEIN, ESQ.
Nevada Bar No. 8675
FLANGAS DALACAS LAW GROUP
E-mail: kps@fdlawlv.com
3275 South Jones Blvd., Suite 105
Las Vegas, Nevada 89146
Telephone: (702) 307-9500
Attorneys for Appellant

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal.

Appellant, Jason T. Smith, is an individual, and thus there is no parent corporation or publicly held company that owns 10% on more of his stock. Appellant, Jason T. Smith, is not using a pseudonym.

The following law firm represented Appellant in the district court proceedings leading to this Appeal: Holley Driggs Walch Fine Puzey Stein & Thompson, with attorneys, Brian W. Boschee, Esq. and Kimberly P. Stein, Esq.

Following the filing for this Appeal, Ms. Stein changed law firms, and now Flangas Dalacas Law Group represents Appellant in this Appeal with Gus W. Flangas, Esq. and Kimberly P. Stein, Esq. as counsel.

Dated this 11th day of May, 2020.

FLANGAS DALACAS LAW GROUP
/s/Kimberly P. Stein
GUS W. FLANGAS, ESQ. (NVBN 4989)
E-mail: gwf@fdlawlv.com
KIMBERLY P. STEIN, ESQ. (NVBN 8675)
E-mail: kps@fdlawlv.com
3275 South Jones Blvd., Suite 105
Las Vegas, Nevada 89146
Telephone: (702) 307-9500
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

On July 9, 2019, Appellant, Jason T. Smith, filed a Complaint with the district court against Respondents, Katy Zilverberg, and Victoria Eagan. (Joint Appendix at 1, Vol. 1). After service of the complaint, the Parties entered into a stipulated preliminary injunction to preserve the status quo and enjoin the Parties from making any further statements. (*Id*. at 12, Vol. 1). Thereafter, Respondents Ms. Zilverberg and Ms. Eagan filed a Special Motion to Dismiss Pursuant to Nev. Rev. Stat. § 41.660 (anti-SLAPP) on September 6, 2019, to which the district court granted the Motion to Dismiss. (*Id*. at 20, Vol. 1). The district court heard this motion on October 3, 2019, and entered an order granting Respondents' Special Motion to Dismiss on October 31, 2019. (*Id*. at 492, Vol.3).

Following the hearing on the Motion to Dismiss, but before entry of the order, on October 17, 2019, Respondents filed a Motion for Attorneys' Fees, Costs and Statutory Awards Pursuant to NRS 41.660. (*Id*. at 421, Vol. 3). The district court heard this motion on November 21, 2019, and entered an order granting Respondents' Motion for Attorneys' Fees, Costs and Statutory Awards Pursuant to Nev. Stat. § 41.670; (2) Granting Respondents' Motion to Dissolve Preliminary Injunction; and (3) Denying Appellant's Motion to Retax on December 20, 2019. (*Id*. at 659, Vol. 4).

Appellant, Jason T. Smith, appeals the district court's order granting Respondents' Special Motion to Dismiss. Specifically, the district court found that Respondents met their initial burden of establishing by a preponderance of the evidence that Appellant's claim is based on Respondents' good faith communications in furtherance of the right to free speech in direct connection with an issue of public concern, that such communications were made in a public forum, and were truthful or made without knowledge of falsehood. (*Id*. at 500:8-28, 502, 501:1-28, 502: 1-11, Vol. 3) . The district court further found that Appellant failed to meet this burden to show a probability of prevailing on his claims. (*Id.* at 503:1-23-28, 504:1-28, 505:1-28, 506:1-11, Vol. 3). Appellant contends that Respondents did not meet their initial burden as Respondents' statements were not made in good faith, were NOT as issue of public interest, and were false and made with knowledge of such falsehood.

Appellant also appeals from the district court's order granting Respondents full attorneys' fees, costs and statutory awards pursuant to NRS 41.670, as well as dissolving the stipulated preliminary injunction in this matter based on dismissing the case. (*Id.* at 659, Vol. 4). Both Appeals were consolidated by the Supreme Court through its order filed on February 27, 2020 granting Appellant's motion to consolidate the Appeals as both cases involved the same Parties and the same legal issues based on the anti-SLAPP defense.

The language of the anti-SLAPP statutes provide that an appeal lies to the Supreme Court. NRS 41.670(4) provides that "[i]f the [district] court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." While this language does not address an appeal if the court grants the special motion to dismiss, it is implicit that the Supreme Court would retain jurisdiction under either circumstance, as NRS 41.670(4) is only allowed an interlocutory appeal, while an appeal of a grant of a motion to dismiss is a direct appeal. Thus, the Supreme Court has appellate jurisdiction over this matter pursuant to NRAP 3A(b)(1).

ROUTING STATEMENT

This matter should remain with the Nevada Supreme Court per NRAP 17 (a)(12) and (14). The matters raised regarding the principal issues concerning the anti-SLAPP statutes are a principal issue of statewide public importance, and while the Supreme Court has made all rulings hereunder to date, allowing the Court of Appeals to decide such an important issue of constitutionality could result in an inconsistency in the published decisions of the Supreme Court or a conflict between published decisions of the two courts. Moreover, as this Court's existing jurisprudence the areas of defamation and anti-SLAPP law has been inconsistently applied in the district courts, this decision touches both constitutional and common law concerns, as other cases which have been retained by this Court.

STATEMENT OF ISSUES

1. Whether a party establishes his burden of proof under the first prong of the anti-SLAPP statute by providing non-substantiated evidence and false evidence to demonstrate the truthfulness of its statements?
2. Whether the district court can ignore some of the *Shapiro* factors adopted by the Nevada Supreme Court in analyzing what distinguishes a private interest from a "public interest," versus considering all factors as intended. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268?
3. Whether Appellant's standing in the "thrifting" community makes him a public figure rising to the level of the need to alert the public on issues of public interest rather than being a personal vendetta by Respondents?
4. Whether the district court failed to consider the sufficiency of admissible evidence in finding that Appellant failed to demonstrate a probability of prevailing on his claims?
5. When an anti-SLAPP motion, special motion to dismiss is granted, NRS 41.670 provides in pertinent part: (a) that a prevailing party is entitled to an award of attorneys' fees, and (b) that the court may award, in addition to reasonable costs and attorneys' fees awarded pursuant to paragraph (a), an amount of up to $10,000.00 to the person against whom the action was brought.

a. Did the district court misapply NRS 41.670 when it concluded Respondents are entitled to all their requested attorneys' fees and costs in the sum of $69,002.53 for one motion, and allowed fees and costs for work not specifically related to the successful Motion to Dismiss under NRS. 41.660, as the prevailing party is still obligated to substantiate the basis for any award of attorneys' fees and costs, which must be reasonable?

b. Did the district court misapply NRS 46.270 when it awarded each Respondent $10,000 in this matter, as this matter was brought against Respondents collectively?

STATEMENT OF CASE

This is an Appeal from two orders both relating to the granting of an anti-SLAPP motion, and both of which were entered and signed by the district court without the approval of Appellant, Jason T. Smith (hereinafter "Smith" or "Appellant"). (Joint Appendix at 492, Vol. 3; at 659, Vol. 4). Mr. Smith filed his Complaint against Respondents in the district court on July 9, 2019, bringing claims for defamation per se and conspiracy. (*Id.* at 1, Vol. 1).

These claims were based on statements Respondents made after an ended friendship and the start of a personal feud between the Parties, and more importantly in an attempt for a competitor to gain the upper hand in business. (*Id.* at 223:3-9, Vol. 1). Respondents turned to YouTube and Facebook, where all Parties operate their respective businesses. (*Id.* at 223:10-22, Vol. 1). On or about June 14, 2018, Respondent, Katy Zilverberg, (hereinafter "Zilverberg" or "Respondent") posted a video on YouTube entitled "Jason T Smith is an abusive bully" (the "YouTube Video"), wherein Zilverberg goes on an approximately 33-minute rant about Smith. (*Id.* at 223:10-20, Vol. 2). Zilverberg makes numerous false statements, of which Respondent, Victoria Eagan (hereinafter "Eagan" or Respondent") endorses, that Smith has and will try to "take people down," falsely inferring, among other things, that Smith is predatory and has harassed individuals, which is not true. (*Id.* at 223:10-20, Vol. 2). As this series of tactics continued, on or about April 25, 2019, Eagan

posted false statements on her Facebook, of which Zilverberg endorsed, that Smith has multiple restraining orders against him. (*Id.* at 223:23-28, Vol. 2). Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders and a verified history of harassment, which Smith does not. (*Id.* at 224:1-15, Vol. 2).

Yet, Respondents argued in their Special Motion to Dismiss Pursuant to Nev. Rev. Stat. § 41.660 that their statements were protected communications under the statute and Smith could not show a probability of prevailing on the merits of his claims. (*Id.* at 20, Vol. 1). The district court heard the motion on October 3, 2019 and entered an order granting it on October 31, 2019. (Id. at 492, Vol.). The district court acknowledged that some of the statements made by Respondents were false, but incorrectly determined by ignoring *Pope v. Fellhauer*, 2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019), that Respondents were still acting in good faith. (Joint Appendix at 357:17-24; 359:-24; 360:1-9, Vol. 2). However, the district court also relied on the fact that Appellant's standing in the "thrifting" community, makes him a public figure rising to the level of the need to alert the public on issues of public interest rather than being a personal vendetta by Respondent. (*Id.* at 362:l-21; 363:l-12, Vol. 2). The fact that Smith is a "so-called" public figure pertains to the malice requirement under a defamation per se claim, which Smith has clearly proven through scheme and vendetta to harm and injure Smith, but because Smith is

a "so-called" public figure does not prove that any statements they say about him automatically pertain to a matter of public interest. (*Id.* at 220:14-24, Vol. 2). You still need to apply the first part of the anti-SLAPP analysis wherein Respondents' claim must be based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. (*Id.* at 226: 1-6, Vol. 2).

This is not how the anti-SLAPP law works. Nevada's anti-SLAPP statutes allow defendants to file special motion to dismiss lawsuits which were initiated to chill free speech. Using Respondents' rationale of free speech would effectively destroy well-settled Nevada law and turn Tort law as it is known in the United States upside down. As free speech does not protect a situation where defendants intentionally set out on a course and pattern of conduct to defame and destroy someone's name and livelihood before the world without privilege or justification.

Nevada's anti-SLAPP statutes create a two-step inquiry process for the court. Nev. Rev. Stat. § 41.660(3). It must first be determined "whether a moving party has established, by a preponderance of the evidence that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." *Id*. Here, the district court decided prong two in Respondents' favor solely because Smith was a "public figure" and ignored the first prong wherein a communication must be in good faith,

meaning not false, and an issue of a public concern, not whether it concerns a public figure. (Joint Appendix at 230:10-21, Vol. 2).

As to the second prong of the anti-SLAPP statutes, while the Court need not reach this stage, Appellant has demonstrated with prima facie evidence a probability of prevailing on the claim. Here, there is more than a minimal level of legal sufficiency shown through admissible evidence that Respondents made the false and defamatory statements about Smith with "actual" knowledge they were false. (*Id.* at 232:21-28, Vol. 2). Although the failure to investigate alone is not grounds for a finding of actual malice, the purposeful avoidance of the truth is in a different category. Nothing whatsoever contained in Appellant's Complaint is designed to chill Respondents' exercise of their First Amendment free speech rights nor has it been filed to obtain a financial advantage over Respondents by increasing litigation costs until Respondents' case is weakened or abandoned. (*Id.* at 234:13-20, Vol. 2). To say otherwise completely ignores the constant stream of false and defamatory statements made by Respondents. In the instant matter, Appellant's claim for Defamation Per Se has merit.

Following the granting of Respondents' anti-SLAPP motion, the district court entered a post-judgment order on December 20, 2019 further granting Respondents all of their requested attorneys' fees and costs in the sum of $69,002.53 for one motion and allowed fees and costs for work not specifically related to the successful

Motion to Dismiss under NRS. 41.660. (*Id*. at 421, Vol. 3). Yet, the court must still review such a motion for reasonableness. The district court further misapplied NRS 46.270 when it concluded Respondents are entitled to $10,000 each, as this matter was brought against Respondents collectively, not individually. (*Id.* at 659, Vol. 4). However, any post judgment award should be eliminated upon this Court's reversal of the district court's granting of the underlying anti-SLAPP motion.

STATEMENT OF FACTS

1.0 The Dispute Between the Parties

This is a factually a very simple case. As there was no discovery allowed or even an evidentiary hearing, the facts are also minimal. What is clear is this is NOT a SLAPP situation.

Smith has been a long-time and well-known member of the thrifting community, a community of individuals who buy and sell used goods online. (Joint Appendix at 222:3-4, Vol. 2). Over the years, Smith has built his reputation in the thrifting community and has established a highly successful business doing so. (*Id*. 222: 5-6, Vol. 2). Smith's business is based on his well-known brand name and reputation as a knowledgeable and successful thrifter. (*Id*. 222: 6-7, Vol. 2).

Respondents are also a part of the thrifting community. (*Id*. 222: 11, Vol. 2). Smith and Respondents have known each other for many years. (*Id*. 222: 11-12, Vol. 2). Smith and Eagan were friends prior to Eagan meeting Zilverberg. (*Id*. 222:

12-13, Vol. 2). Smith introduced Eagan into the Facebook thrifting community. (*Id*. 222: 13-14, Vol. 2). Prior to Respondents meeting each other, Zilverberg was an administrator in Smith's Facebook group. (*Id*. 222: 14, Vol. 2).) Smith personally helped Zilverberg gain supporters and rallied his Facebook group which allowed her to become well-known and establish a successful business in the thrifting community. (*Id*. 222: 16-21, Vol. 2).

Eagan and Zilverberg eventually began a relationship, and Eagan informed Smith that she was going to leave her husband to continue a relationship with Zilverberg. (*Id*. 222: 21-22, Vol. 2). At that time, Smith was also friends with Eagan's now ex-husband. (*Id*. 222: 22-24, Vol. 2). Respondents became upset that Smith did not fully support their relationship, which was solely a result of the fact that Smith was previously friends with Eagan and her husband. (*Id*. 222: 24-26, Vol. 2). As a result, Respondents developed animosity and personal spite towards Smith, and Respondents tried to turn many of Smith's friends against him. (*Id*. 222:26-24, Vol. 2). Since this time, Smith distanced himself from Respondents and cut off all relations with them. (*Id*. 223: 1-2, Vol. 2).

Soon thereafter, Respondents began a campaign against Smith to injure his business and smear his reputation in their inner circle of friends, which are all a part of the thrifting community, and the larger public thrifting community. (*Id*. 223: 3-5, Vol. 2). At the same time, Respondents were in the process of trying to grow their

businesses in the thrifting community, much of which is done through their online presence in the community and the YouTube video channel. Smith is one of Respondents' top competitors. *Id*. 223: 6-9, Vol. 2).

On or about June 14, 2018, Zilverberg posted a video on YouTube entitled "Jason T Smith is an abusive bully" (the "YouTube Video"), wherein Zilverberg goes on an approximately 33-minute rant about Smith. Zilverberg calls Smith names and also makes numerous false statements that Smith has and will try to "take people down." (*Id*. 223: 10-15, Vol. 2). For example, Zilverberg falsely states that Smith has, and will, intentionally get persons thrown out of various business events, again to allegedly "take people down." (*Id*. 223: 13-15, Vol. 2). These false statements made by Zilverberg falsely infer, among other things, that Smith is predatory and has harassed individuals, which is not true. (*Id*. 223: 17-19, Vol. 2). The statements made by Zilverberg, and endorsed by Eagan, have had and continue to have a severe effect on Smith's reputation and has damaged his business. (*Id*. 223: 17-19, Vol. 2).

On or about April 25, 2019, Eagan posted false statements on her Facebook that Smith has multiple restraining orders against him. (*Id*. 223: 21-22, Vol. 2). This post was endorsed by Zilverberg. (*Id*. 223: 22-24, Vol. 2) . Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders and a verified history of harassment, which Smith does not. (*Id*. 223: 23-24, Vol. 2). These statements had and continue to have a severe impact on Smith's reputation

and business in the community. Smith has never had any restraining orders against him. (*Id*. at 250: 3, Vol. 2). Respondents attached a background check of a "Jason Todd Smith" to their Motion to Dismiss; however, the majority of the criminal charges contained therein are not connected in any way to Smith. (*Id*. 223: 26-27; 224:1-2, Vol. 2). The documents produced include criminal charges of an individual entirely unrelated to Smith, which was easily ascertained and known by the Respondents. (*Id*. at 224:1-2, Vol. 2).

While Smith previously lived in Ohio, since September 2000, Smith has only ever lived in California and Nevada. (*Id*. at 250: 8-11, Vol. 2). A majority of the criminal charges, including misdemeanors and felony charges, take place in Ohio after September 2000. (*Id*.) Smith was no longer residing in Ohio at the time these alleged charges occurred. (*Id*.) These charges are not related to Smith, also a common name. (*Id*. at 250: 14-16, Vol. 2). Smith admits that many of the traffic violations prior to the year 2000 contained in the background report are his. (*Id*. at 250: 17-19, Vol. 2). However, the charges also notably include a "minor in possession" and "carry a concealed weapon" in 2006 – in 2006 Smith was 35 years old residing in Nevada, and Smith has never owned a gun in his life. (*Id*. at 250: 14-16, Vol. 2). These charges, except for the traffic violations that Smith admits to, are clearly unrelated to Smith, yet Respondents continue to injure Smith's reputation by now associating Smith's name with additional false charges in a public Court

document. (*Id*. at 250: 17-19, Vol. 2). Notably, none of the charges included in the background report produced by Respondents include any restraining orders. (*Id*. at 250: 20-21, Vol. 2).

Respondents' false statements about Smith are fueled by a private dispute with Smith and a subsequent vendetta to injure Smith and his reputation. (*Id*. at 250: 22-23, Vol. 2). Moreover, Respondents are trying to build their business in the thrifting community and also benefit and gain advantage if Smith's reputation, as a top thrifter in the community, is ruined and his business is destroyed. (*Id*. at 250: 24-26, Vol. 2). Respondents are also capitalizing by using Smith's brand and creating controversy to bring viewers to their online social media and YouTube channel. (*Id*. at 251: 1-3, Vol. 2). Respondents' unlawful actions are nothing more than an attempt by Respondents to publicize a private dispute, gain supporters in the community, harm Smith's brand name and reputation, and capitalize on this to further their business. (*Id*. at 251:4-6, Vol. 2).

2.0 The Proceedings Below

Smith, initiated this case by filing his Complaint on July 9, 2019 against Zilverberg and Eagan. (Joint Appendix at 1, Vol. 1.) After service of the complaint, the parties entered into a stipulated preliminary injunction to preserve the status quo and enjoin the Parties from making any further statements. (*Id*. at 12, Vol.1). On September 6, 2019, after changing counsel, Respondents Zilverberg and Eagan, filed

a Special Motion to Dismiss Pursuant to Nev. Rev. Stat. § 41.660 (anti-SLAPP) (the "anti-SLAPP Motion"). (*Id*. at 20, Vol. 1). In their anti-SLAPP Motion, Respondents argued that their statements were protected communications under the statute and that Smith could not show a probability of prevailing on the merits of their claims. Respondents also submitted false statements as support for their anti-SLAPP Motion, but more importantly did not deny the statements were made. (*Id*. at 52, Vol. 1).

The district court heard the anti-SLAPP Motion on October 3, 2019, and entered an order granting the motion on October 31, 2019, without Appellant's approval, as Appellant submitted a competing order which accurately reflected the findings of fact and conclusions of law which occurred at the hearing. (*Id*. at 421, Vol. 3). A review of the transcript of the hearing will show the differences. (*Id*. at 346, Vol. 2).

Rather than addressing applicable case law, the district court relied on evidence on which the district court admitted was false or unsubstantiated, without allowing an evidentiary hearing or discovery, and based on the Judge's personal overall impression (without discovery to determine whether Respondents knew the statements were false or acted with a high degree of awareness of the probable falsity of the statements or had serious doubts as the publication's truth) found that Respondents were still acting in good faith. Additionally, the district court confused

the issues of a public concern with a public figure and incorrectly applied the second prong of the anti-SLAPP analysis where the court should not have gotten past the first prong.

Following the hearing on the Motion to Dismiss, but before entry of the order, on October 17, 2019, Respondents filed a Motion for Attorneys' Fees, Costs and Statutory Awards Pursuant to NRS 41.660. (*Id*. at 421, Vol. 3). The district court heard this motion on November 21, 2019 and entered an order on December 20, 2019 granting Respondents all of their requested attorneys' fees and costs in the sum of $69,002.53. (*Id*. at 659, Vol. 4). Again, the order was not approved by Appellant and did not reflect the proceedings. The district court also awarded each respondent $10,000 pursuant to NRS 46.270.

SUMMARY OF ARGUMENT

Respondents cannot meet their burden of persuasion under NRS 41.660, as Respondents had clear knowledge of the falsity of their statements. Respondents knew the statements were false and failed to verify the veracity of such highly defamatory statements prior to posting them online, which could have been easily done through online records. Respondents posted false statements about temporary restraining orders against Smith and other criminal conduct for the purpose of bolstering support against Smith to cause greater harm to Smith and his reputation. (Joint Appendix at 223: 23-24; 250:3, Vol. 2). It is clear here that we have a case of

two individuals who have smeared another competitor, and former friend's, name throughout the thrifting community in hopes of intimidating and embarrassing him out of a lucrative market-place. To suggest that such outrageous acts are protected based on alleged free speech would be disingenuous and improper. The Court in *Shapiro* held that "the term 'good faith' does not operate independently within the anti-SLAPP statute. Rather, it is part of the phrase 'good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.' This phrase is explicitly defined by statute in NRS 41.637. Further, the phrase 'made without knowledge of its falsehood' has a well-settled and ordinarily understood meaning. The declarant must be unaware that the communication is false at the time it was made." *Shapiro*, 133 Nev. at 38. Thus, Respondents cannot show that their communications were made in good faith.

Respondents' communications are NOT "an Issue of public interest." In *Shapiro*, the Nevada Supreme Court adopted guiding principles articulated by California courts on what distinguishes a private interest from a "public interest." *Shapiro*, 389 P.3d at 268. In the instant case, the district court failed to address the guiding principles set forth in *Shapiro*. Instead, the district court merely takes it for granted that Respondents' communications were issues of public interest. (Joint Appendix at 502:9-11, Vol. 3). Applying these guiding principles to the instant case

clearly shows that Respondents' false statements do not constitute an issue of public interest.

Respondents allege that they were protecting the thrifting world from Smith and his "anti-social behavior." (*Id*. at 25:18-26, Vol. 1). Such false statements made by Respondents were made to further bolster private animosity and a dispute between the Parties, and not a matter of public interest, nothing more. Respondents' conduct proves to be motivated by the sole purpose of ruining Smith's reputation out of personal spite and animosity and capitalizing on their own careers by destroying a competitor's business, not any alleged "public interest" or "public concern." Respondents cannot turn their private and quixotic fight with Appellant into a matter of public interest simply by communicating it to a large number of people.

In reviewing the underlying prior Supreme Court cases, including recent decisions concerning anti-SLAPP, these cases favor Smith. *Coker v. Sassone*, 135 Nev. Adv. Op. 2 (Jan. 3, 2019) (where the Court found that Respondents need to show claims arose from activity protected by NRS 41.660) *see also Pope v. Fellhauer*, a key mark case on Nevada's anti-SLAPP law, where the Nevada Supreme Court was unanimous in its decision for the litigants who had sued for defamation. 2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019). Further,

reviewing the transcript of the lower court's ruling on the Motion to Dismiss, shows false documents provided by Respondents. (Joint Appendix at 349: 8-14, Vol. 2).

Additionally, the district court confused the issues of a public concern with a public figure and incorrectly applied the second prong of the anti-SLAPP analysis where the court should not have gotten past the first prong. A review of the record, which includes the hearing transcript and the order on the anti-SLAPP motion shows the bias of the district court. (*Id*. at 346, Vol. 2; 492, Vol. 3). Further, even if the district court could get past the first prong, the analysis of the second prong was flawed. Appellant met the burden of establishing, by clear evidence, a prima facie case of defamation and conspiracy.

A prima facie case is established if the plaintiff alleges: "(1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pacquiao v. Mayweather*, 803 F.Supp.2d 1208, 1211 (D. Nev. 2011) (*citing Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424, 427 (2001)). The district court acknowledged some of Respondents statements, including those that he allegedly had multiple restraining orders against him, are false. (*Id*. at 357:17-24; 359:21-24; 360:1-9, Vol. 2).

And even taking the district court's determination that such statements were not recklessly made, they were at least negligent. Clearly, the statements made were

not opinion. Appellant sufficiently pled such elements in his complaint to demonstrate a probability of prevailing on his claim. (*Id*. at 1, Vol 1).

While any post judgment award should be eliminated upon this Court's reversal of the district court's granting of the underlying anti-SLAPP motion, in the event this Court is inclined to find for Respondents, the Court must still review the granting of attorneys' fees, costs and statutory awards. Although NRS 41.670 provides that a prevailing party on an anti-SLAPP motion is entitled to an award of attorneys' fees, the prevailing party is still obligated to substantiate the basis for any award of attorneys' fees, which must also be reasonable. The attorneys' fees awarded were not reasonable, and at a minimum this Court can reduce this award. (*Id.* at 659, Vol. 4).

In determining an award of attorneys' fees, the Court must consider whether the fees sought are reasonable and justified. *Wynn,* 117 Nev. at 13. Here, the attorneys' fees and costs incurred by Respondents were entirely unreasonable and unnecessary. Prior to Respondents' retention of McLetchie Law, the Parties were imminently close to resolving all issues and settling this matter without Court intervention. (*Id*. at 483: 25-28, Vol. 3). Even after Respondents retained McLetchie Law, Smith agreed to provide an extension to Respondents for filing their answer in order to continue resolving the issues without Court intervention. (*Id*. at 484: 2-5, Vol. 3). For unknown reasons, Respondents vehemently refused, without any

justification or good cause, and proceeded to unnecessarily file the anti-SLAPP Motion and incur unnecessary fees. (*Id*. at 484: 5-6, Vol. 3).

Respondents' award for attorneys' fees in the amount of $69,002.53 is more than excessive and entirely unreasonable given Respondents' counsel's expertise on First Amendment matters, the exorbitant number of hours spent on one anti-SLAPP motion, the excessive number of attorneys involved and consulting Respondents in this matter, and the unreasonably broad scope of legal services that Respondents are seeking an award for pursuant to NRS 41.670. Not to mention that Respondents submitted fees for two (2) prior counsel, neither of which worked on the anti-SLAPP motion. (*Id*. at 484: 11-17, Vol. 3).

Additionally, the district court awarded Respondents an additional $20,000 pursuant to NRS 41.670(1)(b). (*Id*. at 669: 14-16, Vol. 4). Respondents at most should be awarded a total of an additional $10,000 in this matter, as this matter and the underlying claims were brought against Respondents collectively, not individually. Again, Respondents failed to meet their burden.

ARGUMENT

1.0 Legal Standard

The standard of review on appeal is that of a mixed question of law and fact, as explained more fully below. *See Coker* 135 Nev. at 10.

A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights. *Stark v. Lackey,* 136 Nev. Adv. Op. 4, 458 P.3d 342, 344–45 (2020). Nevada's anti-SLAPP statutes provide defendants with a procedural mechanism whereby they may file a special motion to dismiss the meritless lawsuit before incurring significant costs of litigation. *Id.*; NRS 41.660(1); *see also Coker* 135 Nev. at 10.

Nevada's anti-SLAPP statutes posit a two-prong analysis to determine the viability of a special motion to dismiss. *Stark*, 136 Nev. Adv. Op. 4, 458 P.3d at 345; *see Coker*, 135 Nev. at 12. First, the district court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." *Stark*, 136 Nev. Adv. Op. 4, 458 P.3d at 345; NRS 41.660(3)(a); *see Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1223 (2019). Absent such a finding, the Motion to Dismiss must be denied. If the court makes the required finding, "the burden shifts to the plaintiff to show 'with prima facie evidence' a probability of prevailing on the claim." *Shapiro*, 133 Nev. at 38. Second, if the district court finds the defendant has met his or her burden, the court must then "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim."

Stark v. Lackey, 136 Nev. Adv. Op. 4, 458 P.3d at 345; NRS 41.660(3)(b); *see Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223.

As to the first prong of the test addressed to the issue of whether the moving defendant has established anti-SLAPP standing "by a preponderance of the evidence," it is a mixed question of law and fact. *See Coker*, 135 Nev. at 12. The appellate court's review of a district court's decision as to a mixed question of law and fact is appropriate where the district court's determination is based on factual conclusions but requires distinctively legal analysis. *Hernandez v. State*, 124 Nev. 639, 646 (2008). In reviewing a mixed question of law and fact, an appellate court gives deference to the district court's findings of fact, but independently reviews whether those facts satisfy the applicable legal standard. *Id*. at 647.

As to the second prong, which the Court need not reach, the standard of review as to "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim," the substantial evidence test should apply. Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497 (1986). A decision that is not supported by substantial evidence is arbitrary and capricious. *See id*.

In determining an award of attorneys' fees, the Court must consider whether the fees sought are reasonable and justified. *Wynn*, 117 Nev. at 13. Although NRS

41.670 provides that a prevailing party on an anti-SLAPP motion is entitled to an award of attorneys' fees, the prevailing party is still obligated to substantiate the basis for any award in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*. *See Shuette v. Beazer Homes Holdings Corp*., 121 Nev. 837, 864-65 (2005).

2.0 Respondents' Statements Are Not Based Upon a Good Faith Communication in Connection With an Issue of Public Concern

Under the first prong of the anti-SLAPP statute, [the Court] evaluate[s] "whether the moving party has established, by a preponderance of the evidence," that he or she made the protected communication in good faith. *See Rosen*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223; NRS 41.660(3)(a); *see also Coker*, 135 Nev. 8. A communication is made in good faith when it "is truthful or is made without knowledge of its falsehood." *Rosen*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223; NRS 41.637; *see also Delucchi v. Songer*, 133 Nev. 290, 300, (2017); *see also Stark*, 136 Nev. Adv. Op. 4, 458 P.3d at 346–47; NRS 41.637 (With respect to the second required showing under prong one of the anti-SLAPP analysis, the defendant bears the burden of establishing by a preponderance of the evidence that the communication "is truthful or is made without knowledge of its falsehood). A determination of good faith requires consideration of all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion. *Rosen*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223.

2.1 Respondents' Statements Are False and Were Made With Knowledge of Falsity

The Court in *Shapiro* held,

> We conclude that the term "good faith" does not operate independently within the anti-SLAPP statute. Rather, it is part of the phrase "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." This phrase is explicitly defined by statute in NRS 41.637. Further, the phrase "made without knowledge of its falsehood" has a well-settled and ordinarily understood meaning. The declarant must be unaware that the communication is false at the time it was made.

Shapiro, 133 Nev. at 38.

The Court further held, "Finally, no communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'" *Id*. at 40. The right to free speech does not protect defamatory statements. S*ee Beauharnais v. Illinois,* 343 U.S. 250, 266 (1952) (holding that libelous statements are outside the realm of constitutionally protected speech); *Gertz v. Robert Welch, Inc*. 418 US 323, 340 (1974) (explaining that "there is no constitutional value in false statements of fact").

Here, the district court acknowledged that some of the statements made by Respondents were false, but incorrectly determined by ignoring *Pope v. Fellhauer*, 2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019), that Respondents were still acting in good faith. (Joint Appendix at 357:17-24; 359:-24; 360: 1-9, Vol. 2). On or about April 25, 2019, Eagan posted statements on her Facebook, of which

Zilverberg endorsed, that Smith has multiple restraining orders against him. (*Id.* at 223:23-28, Vol. 2). Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders and a verified history of harassment, which Smith does not, as shown by Respondents own submitted evidence. (*Id.* at 224:1-15, Vol. 2). Moreover, Zilverberg posted a video on YouTube devoting over 33-minutes to ranting about Smith, wherein Zilverberg makes a false statement, among others, that Smith has, and will, find out where people live in order to "take them down," inferring that Smith stalks people. (*Id.* at 223:10-20, Vol. 2). Zilverberg also alleges that Smith has caused people to want to commit suicide. (*Id*.). This statement is not only false, but it implicates Smith as criminal. This far exceeds any scope protected as free speech and goes far beyond mere opinion testimony. Yet, Respondents do not present any substantive evidence to establish this statement is true, because once again it is entirely false. The district court found this evidence to show that this was Respondents' belief, despite finding most of it to be false. (*Id*. at 492, Vol. 3).

The district court argued that Smith did not provide his own evidence, except for a declaration. (*Id*. at 346, Vol. 2). Yet, in making its determination, "[i]n addition to the pleadings, [the Court] may consider affidavits concerning the facts upon which liability is based. *Coker*, 135 Nev. at 11, *citing Park v. Board of Trustees of California State University*, 393 P.3d 905, 911 (Cal. 5th 2017).

Moreover, it is entirely disingenuous and an insult to this Court for Respondents to now argue that these statements were made without knowledge of falsehood, in light of their own declarations and alleged exhibits thereto. (Joint Appendix at 20, Vol. 1). Respondents had knowledge it was not true, and the ability and duty to verify its veracity prior to posting a statement that infers Smith has a criminal history. Thus, the Court cannot find that there was a determination that Respondents' statements were made upon a good faith communication.

2.2 Respondents' Statements Were Not Made in Direct Connection with an Issue of a Public Concern

In *Shapiro*, the Nevada Supreme Court adopted guiding principles articulated by California courts on what distinguishes a private interest from a "public interest:"

> 1. "public interest" does not equate with mere curiosity;
>
> 2. a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> 3. there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> 4. the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> 5. a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F.Supp.2d 957, 968 (N.D. Cal. 2013), aff'd, 609 F. App'x 497 (9th Cir. 2015) (emphasis added); s*ee also Pope v. Fellhauer*, 2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019).

Numerous decisions have recognized our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But the right to free speech, [a]lthough stated in broad terms, ... is not absolute. *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846 (1999). Liberty of speech ... is ... not an absolute right, and the State may punish its abuse. *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

It is well established that not all speech is afforded the same protection under the First Amendment. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. State of Louisiana*, 379 U.S. 64, 74–75 (1964). "In contrast, speech on matters of purely private concern is of less First Amendment concern." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

The United States Supreme Court has stated that there is "no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 338. The intentional lie does not materially advance society's interest in "uninhibited, robust, and wide open" debate on public issues. *New York Times Co. v. Sullivan, supra*. Falsehoods belong

to that category of utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court has further stated that "[f]alse statements of fact are particularly valueless; they interfere with the truth seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine v. Falwell*, 485 U.S. 46, 51(1988). *See also Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 503-504 (1984) (The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty, and thus a good unto itself, but also is essential to the common quest for truth and the vitality of society as a whole.) Under our Constitution, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend, because there are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-246

(2002) (The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation....); *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992); *Beauharnais*, 343 U.S. at 250 (Libelous utterances not being within the area of constitutionally protected speech....). *Chaplinsky,* 315 U.S. at 571-572. Clearly the instant case involves defamatory speech uttered by Respondents and is therefore not constitutionally protected speech.

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *Snyder v. Phelps*, 562 U.S. 443 (2011) or when it "is a subject of general interest and of value and concern to the public," *Id*. at 1211; s*ee also, San Diego v. Roe*, 543 U.S. 77, 83-84 (2005). To determine whether speech is of public or private concern, the United States Supreme Court has held that it must independently examine the "content, form, and context' of the speech" revealed by the whole record.' *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 761 (1985). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all aspects of the speech. *Snyder*, 562 U.S. at 443.

In *Pope v. Fellhauer*, a key mark case on Nevada's anti-SLAPP law, this Court was unanimous in its decision for the litigants who had sued for defamation.

2019 WL 1313365, 437 P.3d 171 (Nev. March 21, 2019). The case involved a dispute between three cul-de-sac neighbors – the neighbors did not get along and had multiple verbal altercations. *Id*. In that case, Mr. Pope began making statements about the Fellhauers on social media sites, such as Twitter and Altert-ID, a "neighborhood crime-reporting website," alleging that the Fellhauers were dangerous, sick, mentally unstable, they were the reason behind the neighborhood being labeled a "crime zone," and asserting the Fellhauers recorded a naked 1-year old swimming in Mr. Pope's pool. *Id*. Eventually, the Fellhauers filed a defamation complaint against Mr. Pope and in response Mr. Pope filed an anti-SLAPP motion to dismiss. *Id*. The Court looked to the above listed factors in determining whether there was a "public interest" or "public concern," and in applying these factors, the Court determined that Mr. Pope was simply making public his private feud with the Fellhausers. *Id*. The Court found it significant that Mr. Pope engaged in name-calling: "it is unclear how calling the Fellhauers "'weird,' 'wack-jobs,' 'EXTREMELY MENTALLY UNSTABLE,' 'crazy,' and 'sick' conveyed anything other than 'a single [person being] upset with the status quo.'… Thus, we cannot conclude that the derogatory remarks about his neighbors were directly related to an issue of public concern." *Id*. at *3. The Court ultimately concluded, that "[w]e see no evidence that anyone—other than his two friends—were concerned with Pope's commentary or that Pope was adding to a preexisting discussion." Id. at *2.

Pope v. Fellhauer is identical to the case at issue here. Similarly, here the evidence in this matter clearly establishes that this is not a public interest but a mere effort by Respondents to gather ammunition for another round of private controversy, which is not protected speech under the anti-SLAPP analysis. The parties clearly have an ongoing personal dispute relating to a failed friendship that has caused hurt feelings and personal spite. As a result, Respondents have used hurt feelings and personal spite to fuel a scheme to injure Smith and his reputation for their personal gain.

In the instant case, the district court failed to address the guiding principles set forth in *Shapiro*. Instead, the district court merely takes it for granted that Respondents' false communications were issues of public interest. Notwithstanding that the district court failed to address the guiding principles, applying them to the instant case clearly shows that Respondents' statements do not constitute an issue of public interest.

2.2.1 Respondents Statements about Appellant Were Not a Public Interest But a Mere Curiosity

Respondents' statements about Appellant's alleged anti-social behavior, temporary restraining orders and a criminal record are not directly connected to the thrifting community nor the buying and selling of used goods. There was no evidence presented that Respondents were adding to a pretexting discussion or that anyone had a fear of Appellant. (Joint Appendix at 20, Vol. 1). While a customer

of Appellant may find the information interesting, it is nothing more than a mere curiosity.

2.2.2 Respondents Statements Were Not a Public Interest When Directed to Their Audience Solely

Respondents only posted on their YouTube channel and Facebook pages, both of which are directed to their followers. While such pages are public, Respondents were not a publisher to a mass general audience. Again, Respondents were attempting to turn a private vendetta into a public matter. But such attempts do not make the statements a public concern.

2.2.3 Respondents Improperly Assert a Broad Public Interest

There should be some degree of closeness between the challenged statements and the asserted public interest. Respondents allege that they were protecting the thrifting world from Smith and his "anti-social behavior." (Joint Appendix at 5:18-26, Vol. 1). It is unclear how statements that Smith allegedly has a criminal record, including temporary restraining order, is a concern to a substantial number of people versus that of a relatively small market of customers of Respondents in the thrifting community. These statements are not directly connected to the thrifting, and buying and selling used goods, which is the market that Respondents' statements were directed at. Rather, Respondents' conduct proves to be motivated by the sole purpose of ruining Smith's reputation out of personal spite and animosity and

capitalizing on their own careers by destroying a competitor's business, not any alleged "public interest" or "public concern."

2.2.4 Respondents Statement Were a Mere Effort to Gather Ammunition

The focus of Respondents' conduct in making the statements was to further their feud with Appellant and to take away his business. Such focus was not to further a public interest.

2.2.5 Respondents Cannot Turn Their Private Feud Into a Matter of Public Interest

A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. Respondents' false statements were made in an effort to publicize a personal and private controversy to gain supporters and sympathy against Smith. Respondents have failed to identify any legitimate public concern or interest, other than persuade others to dislike Smith as they do and find supporters to help damage and ruin Smith's career. The false and defamatory statements made by Respondents are not protected as free speech, as they were not made in good faith, are not a matter of public interest, and were made as a result of hurt feelings, spite, and a scheme on behalf of Respondents to harm Smith. The Court cannot ignore some of the *Shapiro* factors in analyzing what distinguishes a private interest from a "public interest."

It more than appears that Respondents' only goal was to gather ammunition for another round of private controversy. Even assuming arguendo that there a 100 or more people wanting Respondents to continue with their statements about Appellant, Respondents cannot turn otherwise their private and quixotic fight with Appellant into a matter of public interest simply by communicating it to a large number of people. As Respondents' statements are false, made with knowledge of them being false, and as such not made upon a good faith communication, and not made in direct connection with a public concern, the district court misapplied the first prong of the anti-SLAPP statute.

3.0 Appellant Has Demonstrated A Probability of Prevailing on His Claim

Only after the movant has shown that he or she made the protected statement in good faith [does the court] move to prong two and evaluate "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." *Rosen*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223; see NRS 41.660(3)(b); *see Stark*, 136 Nev. Adv. Op. 4, 458 P.3d at 345. As to the second prong of the anti-SLAPP statutes, while the Court need not reach this stage, Appellant has demonstrated with prima facie evidence a probability of prevailing on the claim. *See Stark*, 136 Nev. Adv. Op. 4, 458 P.3d at 345. NRS 41.660(3)(b). To determine whether the prima facie evidence standard is met, the Court looks to California's anti-SLAPP jurisprudence. *See Abrams v. Sanson*, 136 Nev. Adv. Op. 9, 458 P.3d

1062, 1069 (2020) citing NRS 41.665(2) (stating that a plaintiff's burden under prong two is the same as a plaintiff's burden under California's anti-SLAPP law). On the second step of the anti-SLAPP analysis, the burden shifts to the plaintiff to show a reasonable probability of succeeding on the merits. *Todd v. Lovecruft*, No. 19 CV 01751 DMR, 2020 WL 60199, at *14 (N.D. Cal. Jan. 6, 2020).

Here there is more than a minimal level of legal sufficiency shown through admissible evidence that Respondents made the false and defamatory statements about Smith with "actual" knowledge they were false. In other words, Respondents either lied or turned a blind eye. Either way, there is more than a minimal level of legal sufficiency with admissible evidence to show that Respondents made these false statements about Smith with reckless disregard for their veracity. Although the failure to investigate alone, is not grounds for a finding of actual malice, (s*ee Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, (2003)), the purposeful avoidance of the truth is in a different category. *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, at 692 (1989).

As stated, because it is rare for a defendant to admit to a culpable state of mind, the instant inquiry must be guided by circumstantial evidence, and inferences. In the instant matter, Smith's claim for Defamation Per Se has merit. Nothing whatsoever contained in Smith's Complaint is designed to chill Respondents' exercise of their First Amendment free speech rights nor has it been filed to obtain

a financial advantage over Respondents by increasing litigation costs until Respondents' case is weakened or abandoned. To the contrary, Smith's Complaint is being brought for the sole purpose of redressing the damages he has incurred due to the wrongful conduct of Respondents. *See Navellier v. Sletten*, 52 P.3d 703, 711–12 (Cal. 4th 2002) (applying the anti-SLAPP statute to an action does not take away the constitutional right to petition the court to redress legitimate grievances. As our emerging anti-SLAPP jurisprudence makes plain, the statute poses no obstacle to suits that possess **minimal** merit) (emphasis added); *see Abrams*, 136 Nev. Adv. Op. 9, 458 P.3d at 1069 *citing Navellier*, 52 P.3d at 711 (anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities **without striking legally sufficient claims**). (Emphasis added).

To say otherwise completely ignores the constant stream of false and defamatory statements made by Respondents. Respondents are improperly trying to use the anti-SLAPP statute to avoid having this matter decided by a finder of fact. As the Court can see from the various pleadings in this matter, Respondents statements were blatantly false, and Respondents knew they were false when they published them, or at a minimum, Respondents published them with reckless disregard for their veracity. Moreover, it clearly appears that the little investigation Respondents said they did would have actually provided them actual knowledge of

the falsity of their statements. Appellant's action is not a SLAPP suit, but is an action for damages due to a series of improper actions by Respondents.

4.0 The District Court Misapplied NRS 41.670 in Awarding Attorneys' Fees, Costs and Statutory Damages

If this Court is inclined to find that this is a SLAPP suit and upholds the granting of the anti-SLAPP motion, the Court needs reduce the grant of attorneys' fees, costs and statutory awards. In determining an award of attorneys' fees, the Court must consider whether the fees sought are reasonable and justified. *Wynn,* 117 Nev. at 13. Although NRS 41.670 provides that a prevailing party on an anti-SLAPP motion is entitled to an award of attorneys' fees, the prevailing party is still obligated to substantiate the basis for any award of attorneys' fees. To determine an amount of fees to award:

> In Nevada, 'the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness. Accordingly, in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount or a contingency fee. We emphasize that, whichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank.*

Shuette v. Beazer Homes Holdings Corp. 121 Nev. 837, 864-65 (2005).

Here, reason and fairness dictate that Respondents should be awarded attorneys' fees based only upon competent evidence, and a showing the fees are not excessive. When making a determination on an award for attorney's fees, the Court

considers:

> (1) the advocate's qualities, including ability, training, education, experience, professional standing, and skill;
>
> (2) the character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
>
> (3) the work performed, including the skill, time, and attention given to the work; and
>
> (4) the result-whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate National Bank, 85 Nev. 345 (1969).

Here, the attorneys' fees and costs incurred by Respondents were entirely unreasonable and unnecessary. Prior to Respondents' retention of McLetchie Law, the Parties were imminently close to resolving all issues and settling this matter without Court intervention. (Joint Appendix at 483: 25-28, Vol. 3). Even after Respondents retained McLetchie Law, Smith agreed to provide an extension to Respondents for filing their answer in order to continue resolving the issues without Court intervention. (*Id*. at 484: 2-5, Vol. 3). For unknown reasons, Respondents' vehemently refused, without any justification or good cause, and proceeded to

unnecessarily file the anti-SLAPP Motion and incur unnecessary fees. (*Id*. at 484:5-6, Vol. 3).

Respondents' award for attorneys' fees in the amount of $69,002.53 is more than excessive and entirely unreasonable given Respondents' counsel's expertise on First Amendment matters, the exorbitant number of hours spent on one anti-SLAPP motion, the excessive number of attorneys involved and consulting Respondents in this matter, and the unreasonably broad scope of legal services that Respondents are seeking an award for pursuant to NRS 41.670. Not to mention that Respondents submitted fees for two (2) prior counsel, neither of which worked on anti-SLAPP motion in an amount awarded of $7,287 alone. (*Id*. at 484: 11-17, Vol. 3.) The attorneys' fees awarded were excessive, unreasonable, and some of the charges were not related to the anti-SLAPP motion. At a minimum the Court should reduce the attorneys' fees and costs awarded by the amounts for the two (2) prior counsel and the additional amount awarded above the $46,872.34 requested in the Motion for Attorneys' Fees, Costs and a Statutory Awards pursuant to NRS 41.660, for a total reduction of approximately $22,000.

Additionally, the district court awarded Respondents an additional $20,000 pursuant to NRS 41.670(1)(b). (*Id*. at 669: 14-16, Vol. 4). NRS 41.670(1)(b) provides in pertinent part "that the court may award, in addition to reasonable costs and attorneys' fees awarded pursuant to paragraph (a), an amount of up to

$10,000.00 to the person against whom the action was brought." This matter was brought against Respondents collectively. (Joint Appendix at 1, Vol. 1). All causes of action in Smith's Complaint were brought against both Respondents collectively and at all times relevant hereto Respondents have retained counsel together. As such, Defendant at most should be awarded a total of $10,000 pursuant to NRS 41.670(1)(b). Thus, this Court should reduce the total of $89,002.53 awarded in attorneys' fees, costs and statutory awards to at least to $46,872.34. Moreover, this Court should advise the district court and caution against further awards in relation to motions concerning this Appeal.

CONCLUSION

Respondents cannot show their communications were made in good faith nor can Respondents meet their burden of persuasion under NRS 41.660, as Respondents had clear knowledge of the falsity of their statements. Further, Respondents' communications are NOT "an issue of public interest." As the district court misapplied the first prong of the anti-SLAPP statute, this Court should overturn the order granting Respondents' anti-SLAPP motion. At a minimum this Court should remand this case for further discovery and an evidentiary hearing.

Even if this Court finds Respondents established by a preponderance of the evidence that they satisfied the first prong of the anti-SLAPP statute, then the Court should review the second prong of the anti-SLAPP statute and find that Appellant

has demonstrated a probability of prevailing on his claims and this Court should overturn the order granting Respondents' anti-SLAPP motion.

In the unlikely event that this Court does not overturn the granting of Respondents' anti-SLAPP motion, this Court must still reduce the granting of attorneys' fees, costs and statutory awards. The attorneys' fees awarded were excessive, unreasonable and some of the charges were not related to the anti-SLAPP motion. Additionally, the district court awarded Respondents an additional $10,000 pursuant to NRS 41.670(1)(b). At a minimum this Court can reduce this award.

RULE 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 8,886 words; and

Finally, I hereby certify that I have read this *Appellant's Opening Brief* and to the best of my knowledge and information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Appellant's Opening Brief* complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on or is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of May, 2020.

FLANGAS DALACAS LAW GROUP

/s/Kimberly P. Stein

GUS W. FLANGAS, ESQ. (NVBN 4989)
E-mail: gwf@fdlawlv.com
KIMBERLY P. STEIN, ESQ. (NVBN 8675)
E-mail: kstein@fdlawlv.com
3275 South Jones Blvd., Suite 105
Las Vegas, Nevada 89146
Telephone: (702) 307-9500
Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, on this 11th day of May, 2020, the **APPELLANT'S OPENING BRIEF,** which was electronically filed with the Clerk of the Nevada Supreme Court, was served upon each of the parties to appeals 80154 and 80348 via electronic service in accordance with Administrative Order 14-2 and through the Supreme Court of Nevada's electronic filing addressed to the following:

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
Leo S. Wolpert, Esq.
McLetchie Law
701 E. Bridger, Avenue, Suite 520
Las Vegas, NV 89101
E-mail: maggie@lvlitigation.com

Attorneys for Respondents
Katy Zilverberg and Victoria Eagan

/s/ Andi Hughes
An employee of Flangas Dalacas Law Group